No. 80-1885

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT M. McDONALD,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented for Review

1. Since petitioner concedes that New Jersey's standard for judicial review of evidence adduced at trial accords with *Jackson* v. *Virginia*, 443 U.S. 307 (1979), should this Court grant *certiorari* simply to review evidence which the State courts correctly found to be legally sufficient to support petitioner's conviction for second degree murder?

2. Should this Court grant *certiorari* to review the factual circumstances of petitioner's failure to avail himself of retained counsel's presence at a non-custodial investigative interview?

3. Since the State courts found that the prosecutor did not falsify grand jury expert testimony, and since the relevant law is undisputed, should this Court grant *certiorari* simply to find facts where the grand jury testimony at issue was less favorable to petitioner than the trial testimony and where he had discovery and had the opportunity to cross-examine at trial but chose not to do so?

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

Jurisdiction

Constitutional Provisions Involved

Respondent accepts petitioner's statements of the above-captioned items in accordance with *U.S.Sup.Ct. R.* 34.2, incorporated by reference in *U.S.Sup.Ct. R.* 22.1.

Statement of the Case

A. Introduction

During the early afternoon of December 16, 1976, the body of 54 year old Doris McDonald was discovered in the bedroom of her residence in suburban New Jersey. Mrs. McDonald had been shot a number of times. No witnesses to the murder were ever located, nor did anyone confess to the crime. Nevertheless, a compelling set of circumstantial proofs ultimately led a trial jury to the inexorable conclusion that Doris McDonald's murderer was her husband, petitioner herein.

B. The Doris McDonald murder investigation.

Petitioner and Doris McDonald were married for 34 years and had three grown daughters, Barbara McDonald Shafer, Susan McDonald DeSantis and Jeanne McDonald Katz. At the time in question, the couple lived in a one-family house. Petitioner was part owner of a small foundry located in another town while Mrs. McDonald was employed as a sales representative for a concern located elsewhere. Petitioner was also suffering from what was then believed to be terminal cancer.

On December 10, 1976, petitioner and a neighbor named Linda Berger made arrangements for her to accept delivery of some appliances that petitioner had purchased for his daughter Susan (2T35-12 to 17).[1] Two days later,

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[1] TGJ refers to the transcript of grand jury proceedings conducted on June 23, 1977.
T refers to the transcript of trial, April 30, 1979.
2T refers to the transcript of trial, May 1, 1979.

(Footnote continued on following page)

petitioner asked Mrs. Berger if she would direct the deliverymen to Susan's house rather than accept delivery herself. When Mrs. Berger agreed, petitioner gave her the keys to Susan's house and a gratuity for the delivery men (2T37-18 to 2T38-7).

During the morning of December 15, Mrs. Berger superintended the delivery of the appliances (2T38-15 to 23). Upon her return from Susan's house, Mrs. Berger attempted to reach Mrs. McDonald in order to inform her that the appliances had been delivered. When she called her office, however, she was advised that Mrs. McDonald had not come to work that morning (2T40-17 to 20). Although Mrs. McDonald's gold automobile was parked in the driveway of the McDonald home, telephone calls to the residence went unanswered (2T39-11 to 18; 2T40-6 to 12). Early that afternoon, petitioner called Mrs. Berger to ask about the delivery (2T40-4 to 8). Mrs. Berger confirmed the delivery and informed petitioner that she had been unable to reach Mrs. McDonald either at home or at work. Petitioner thereupon asked her to try again. Shortly thereafter, Mrs. Berger called petitioner to advise him that there was still no answer to telephone calls

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(Footnote continued from preceding page)

3T refers to the transcript of trial, May 2, 1979.
4T refers to the transcript of trial, May 3, 1979.
5T refers to the transcript of trial, May 7, 1979.
6T refers to the transcript of trial, May 9, 1979.
7T refers to the transcript of acquittal motion, May 8, 1979.
8T refers to the transcript of summations and the jury instructions, May 9, 1979.
9T refers to the transcript of trial, May 9, 1979.
10T refers to the transcript of trial, May 10, 1979.
TM refers to the transcript of post-trial motions, June 15, 1979.
2TM refers to the transcript of motion, June 28, 1979.
TS refers to the transcript of sentencing, July 9, 1979.

placed to the McDonald home (2T40-13 to 16; 2T40-21 to 24). Petitioner then requested that Mrs. Berger call his daughter Barbara to have her check the house (2T40-25 to 2T41-3).

Shortly after 2:00 p.m., Barbara and her aunt, Janet Weinman, arrived at the McDonald residence and noted the continued presence of Mrs. McDonald's automobile (2T41-4 to 22; 2T50-6 to 25). After Barbara unlocked the front door, the two women went through the house (2T51-1 to 17; 2T59-6 to 20). They discovered the victim in the upstairs bedroom (2T51-18 to 2T52-6).

Mrs. McDonald, clad in a heavy red winter robe, was found lying on her stomach across the bed. Since the bedroom was darkened and the shades were drawn, Mrs. Weinman turned on a hallway light. She then returned to the bedroom and removed a pillow which covered Mrs. McDonald's head. Mrs. Weinman then instructed Barbara to telephone the rescue squad (2T52-7 to 2T54-16; 2T59-21 to 2T61-3).

First to respond to the call from the McDonald residence was local police officer John Haverstick whom Barbara directed to the bedroom (2T65-24 to 2T66-25; 2T72-14 to 21). Patrolman Haverstick observed Mrs. McDonald lying on the bed and a pool of already coagulating blood beneath her nose and mouth. The officer also noted a puncture type wound under Mrs. McDonald's left ear lobe (2T73-4 to 15). The victim's body appeared stiff, and the officer was unable to detect a pulse (2T74-17 to 20). At that point, Patrolman Haverstick ushered the women from the bedroom and contacted the police (2T74-20 to 2T75-2).

At approximately 2:30 p.m., Captain William Potynsky arrived and directed that the crime scene be preserved.

He then took steps to notify the County Prosecutor's Office (2T97-17 to 2T93-9; 2T94-10 to 2T95-2). Meanwhile, petitioner and other members of the family contacted by Mrs. Weinman began arriving at the house and congregating downstairs (2T63-1 to 2T64-7; 2T119-1 to 2T121-6; 3T72-9 to 3T73-5).

Within 30 minutes, detectives from the county prosecutor's office had responded and noted that Mrs. McDonald's body was lying face down across the bed with her arms tucked underneath her stomach (2T32-11 to 14; 3T85-3 to 7). Further examination of the body revealed that the victim was wearing a watch and several rings (3T122-4 to 7; 3T122-24 to 3T123-4). Gunpowder marks were visible on the pillow which lay beside the body and several apparent bullet holes were present in it (2T135-2 to 9; 3T85-9 to 10).

Various articles appeared on each of two nightstands, one located on each side of the bed (2T95-15 to 22). On one, which bore what was then thought to be only a pre-existing scuff mark or indentation, was a digital clock/radio which was in good working order (2T96-15 to 16; 3T95-20 to 3T97-1). On the other was an opened *TV Guide* and a small travel alarm which still gave the correct time (3T97-18 to 3T98-18). Subsequent examination of the travel alarm disclosed that the alarm mechanism had been set for seven o'clock and that the alarm itself, the alarm lever of which remained at the "on" position, had been allowed to run out (3T98-19 to 3T99-16; 3T121-4 to 22).

The bedroom in general appeared entirely undisturbed, and no signs of a struggle between the victim and her assailant were evident (2T132-4 to 2T133-5; 3T93-3 to 11). Jewelry as well as two expensive wristwatches were in open view on a dresser (2T133-7 to 8; 3T93-12 to 13;

3T121-22 to 3T122-4). Also lying atop the dresser were a roll of pennies and approximately $28 in currency (2T133-6; 3T93-13 to 14), while a small television set rested undisturbed on its stand opposite the bed (2T133-3 to 5). Finally, $20 in currency, a shoe box full of pennies and a twelve gauge, single-shot Stevens shotgun were discovered in the bedroom closet (2T133-13 to 15; 3T93-15 to 19). Visual examination of the room revealed no indications of a burglary and no fingerprints were obtained from dusting various articles located within it (2T76-12 to 2T77-20; 3T93-3 to 19; 3T94-5 to 3T95-19).

While the investigation continued upstairs, Detectives Joseph Zimmerman and Anthony Tauriello checked the doors and windows of the house for signs of a forced entry. There were none (3T35-1 to 5; 3T68-21 to 3T70-8; 3T135-24 to 3T136-10). Petitioner also advised the detectives that nothing appeared to be missing from the house (3T36-6 to 13; 3T69-18 to 25).

While the local police officers canvassed the neighborhood for clues or information bearing on the crime, the prosecutor's detectives began interviewing those members of the McDonald family present at the scene. Prior to any questioning, petitioner was advised of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, reh. den. 385 U.S. 890 (1966). He signed a *Miranda* warning card. Petitioner also gave the detectives written authorization to take the shotgun (2T137-8 to 16; 2T171-11 to 2T173-16).

Petitioner then outlined his whereabouts and activities from approximately 5:30 p.m. the previous evening. In this regard, petitioner related that he had arrived home from work between 5:30 and 6:00 p.m. and that he had then attended a dance recital involving his grandchildren with his sister-in-law Janet Weinman (2T137-17 to 2T138-1). Petitioner returned home at approximately 8:00 p.m. His

wife arrived home appoximately thirty minutes later (2T 138-2 to 10). The two conversed for a time thereafter before petitioner went to bed at 9:30 p.m. (2T138-11 to 15). Petitioner arose for work at 4:00 a.m. the following morning (2T138-16 to 20). As he prepared to leave, he roused is wife and spoke briefly with her concerning whether she would be working overtime again that evening (2T138-21 to 2T139-2). Petitioner then checked his wife's alarm to make sure it was set to awake her at 7:00 a.m. (2T139-3 to 6). Petitioner had left the house and departed for work by 4:15 a.m. (2T138-21).

After this interview concluded, petitioner accompanied the investigating officers to the County Prosecutor's Office where he was again administered the *Miranda* warnings. Petitioner then agreed to give a formal statement (T173-17 to T174-20; 2T139-7 to 2T140-13; 3T19-77 to 3T20-15).

After providing certain biographical data, petitioner chronicled his activities in a fashion essentially consistent with the account he had rendered at the scene of the crime (3T22-4 to 3T25-12). As before, petitioner related that he had gone to bed at 9:30 p.m. the previous evening. His wife was also in bed at that time but watching television (3T25-13 to 19). During the night, petitioner sensed his wife getting up to use the bathroom. At an unascertained time thereafter, petitioner also arose to use the bathroom (3T26-10 to 22).

Petitioner then repeated his account of his early morning activities, alluding to the brief conversation with his wife and the checking of her alarm to make sure it was set for 7:00 a.m. (3T26-23 to 3T28-7). Petitioner noticed nothing unusual as he was leaving the house, closing and then checking the front door to ensure that it had locked behind him (3T28-17 to 3T29-1). Petitioner then drove to work, arriving at the foundry shortly before 5:00 a.m. (3T29-2 to 12).

Petitioner thereupon recalled his telephone conversations of that afternoon with Linda Berger and the call he had subsequently received from Janet Weinman informing him of his wife's death (3T30-5 to 3T31-5). Petitioner had then been driven home by his business partner (3T31-6 to 10).

In the ensuing portion of his statement, petitioner revealed that difficulties had recently arisen in his marriage. After a series of "heated arguments" with his wife, petitioner had consulted an attorney about divorce and had paid him a retainer approximately three weeks to one month prior to the murder. At that point, however, petitioner's relationship with his wife began to improve, and no proceedings were instituted (3T31-17 to 3T32-14).

Petitioner further related that the friction in his marriage stemmed from his relationship with a Miami Beach woman named Lisa Boffman and dated from a July 1976 confrontation between Ms. Boffman and his wife at a hospital where petitioner had been recuperating from surgery. Petitioner also disclosed that he had spoken to Ms. Boffman on the telephone earlier that afternoon prior to receiving word of his wife's death (3T32-15 to 3T34-11).

Petitioner could give the officers no reason why anyone he knew would have wanted to kill his wife. She was "very well liked." (3T34-15 to 20). Prior to her death Mrs. McDonald had not commented about any strangers coming to the house (3T34-21 to 25). Petitioner thereupon acknowledged that he had toured the house with Detective Taurello inspecting the windows and doors and had found "absolutely nothing" which might have suggested a forced entry (3T35-1 to 5). Nor was he aware of anything missing from the house (3T35-6 to 13). Petitioner then closed his statement by agreeing to bring any further information he might later discover or word of anything missing from his house to the investigators' attention (3T36-2 to 10).

At the conclusion of his formal statement, petitioner underwent a polygraph examination.[2] As before, this examination was preceded by a recital and waiver of the *Miranda* rights (T174-21 to T175-8). An investigator drove petitioner to his brother's home (2T102-13 to 20).

While the foregoing was in progress, the body of Doris McDonald was removed to the morgue at Perth Amboy General Hospital (4T38-2 to 4T39-3). A preliminary examination of the body was conducted by Dr. Shuster at 4:50 p.m. that afternoon. A full autopsy performed the following morning revealed no evidence of sexual assault (3T102-21 to 3T106-19; 4T48-16 to 18).

No further developments in the investigation are evident until February 27, 1977. On that date, Larry Shafer

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[2] Petitioner objected to mention of this fact in respondent's papers in opposition to petitioner's application for bail pending *certiorari*. Petitioner objected on the ground that no evidence of the polygraph administration was presented to the jury. This, of course, is true. However, the trial judge knew of the examination, as is noted above in text. In the totality of the circumstances, it is respondent's position that since administration of the examination was preceded by *Miranda* warnings, the giving of the warnings occurred in an atmosphere in which petitioner's sensitivity to his rights must be said to have been enhanced. It helps to place his subsequent course of cooperation with the police in context.

No inference may be drawn from the giving of the test. A polygraph test and its results are not admissible in New Jersey at trial unless there has been a prior stipulation by both parties, regardless of whether the results are favorable to the accused. *State* v. *Melvin*, 65 N.J. 1, 16-17, 319 A.2d 450, 456-459 (1974); *State* v. *McDavitt*, 62 N.J. 36, 46, 297 A.2d 849, 854 (1972); see *State* v. *Driver*, 38 N.J. 255, 262 183 A.2d 655, 854 (1962). Hence, it is not inferable that the polygraph in this case reached a conclusive result, much less that it was favorable or unfavorable to petitioner.

and Bill DeSantis proceeded to the McDonald residence to help their father-in-law clean up the bedroom wherein Mrs. McDonald had been murdered (5T3-20 to 5T4-16). Before the two men began moving the furniture, petitioner called their attention to a mark on the surface of one of the nightstands (5T4-17 to 5T5-3). Petitioner then picked up the digital clock/radio which rested atop it, shook his head and muttered, "Oh, boy." (5T5-4 to 7). After petitioner had placed the clock/radio back on the nightstand, Shafer lifted the clock/radio back up and noted what appeared to be a bullet hole in its underside. He then placed it back down without comment and commenced moving furniture out of the bedroom (5T6-2 to 17; 5T9-16 to 5T10-25).

Sometime thereafter, Shafer wrapped up the cord of the clock/radio and placed in a wastebasket which he in turn put in a dresser drawer. Upon observing Shafer's action, petitioner asked him what he was going to do with the clock/radio. When Shafer replied that he was going to take it downstairs, petitioner said, "No, leave it here. I'm going to throw it out." Shafer thereupon removed the clock/radio from the wastebasket and placed it on the floor (5T6-18 to 5T7-7; 5T12-25 to 5T13-12).

That evening, Shafer contacted Detective Zimmerman to inform him of the incident (3T38-24 to 3T39-7; 5T7-11 to 20; 5T13-16 to 19). The detective thereupon made arrangements to retrieve the trash that petitioner would be putting out the next morning. As expected, the trash from the McDonald residence included the clock/radio (2T104-13 to 2T105-14; 3T38-8 to 3T41-1). And when subsequently dismantled, the clock/radio yielded a spent bullet (2T106-4 to 15; 3T41-10 to 18; 3T132-13 to 3T 134-1).

On March 10, 1977, Detective Zimmerman visited the foundry to ask petitioner certain questions about the bed-

room (T175-9 to T177-17; 3T42-5 to 12). The Detective did not recite the full *Miranda* warnings; he merely advised petitioner, as he had during previous such interviews, that petitioner was not obligated to speak to him. Petitioner, in turn, voiced no objection to responding to Detective Zimmerman's inquiries. Subsequently, when asked what had become of the clock/radio, petitioner told the detective that his son-in-law Larry Shafer had thrown it out while cleaning the bedroom (T178-14 to 21; 3T 42-19 to 3T43-17).

C. The grand jury proceedings.

On June 23, 1977, the county grand jury convened to consider the evidence developed in the Doris McDonald murder investigation. The evidence adduced included a general narration of the foregoing events and statements.

The grand jurors considered the testimony of the County Medical Examiner, Dr. Shuster. On the basis of factors observed during his preliminary examination of the body as well as his autopsy findings, Dr. Shuster estimated the time of death at 2:00 a.m. on December 16 (TGJ23-6 to 14). Because of the lividity of the body, the doctor indicated that the victim had been dead a minimum of eight hours prior to the preliminary examination conducted shortly before 5:00 p.m. that date (TGJ23-15 to TGJ24-2). The rigidity of the victims limbs at that time suggested that the death had most likely occurred within the previous twelve to eighteen hours; the median of this figure, or 15 hours, provided the 2:00 a.m. estimate (TGJ24-3 to 22). Dr. Shuster then acknowledged that a "good estimation" of Mrs. McDonald's death would vary between five to six hours prior to 2:00 a.m. to three hours after that time (TGJ24-8 to TGJ25-7).

D. Trial

Trial commenced with a *Miranda* hearing to determine the admissibility of petitioner's March 10, 1977 statement regarding the clock/radio. Upon considering the testimony of both Detective Zimmerman and petitioner, the court concluded that petitioner, "a person of more than usual alertness," had been fully aware of his constitutional rights at the time of the contested interview and had knowingly and voluntarily spoken to the detective. Accordingly, petitioner's March 10 statement was held admissible (2T14-6 to 2T17-20).

Linda Berger, Janet Weinman and Patrolman Haverstick recounted the events which had led to the discovery of the victim's body. See generally (2T35-22 to 2T42-15; 2T49-15 to 2T57-9; 2T64-25 to 2T77-20; 2T82-7 to 14). Investigators then elaborated on those aspects of the crime scene investigation which negated the likelihood that Mrs. McDonald had been murdered by a burglar or other intruder. See, *e.g.*, 3T70-2 to 8—doors to McDonald house in good condition; 2T117-19—back door locked when inspected; 3T68-21 to 3T70-8 and 3T136-8 to 10—windows and doors to residence checked and no signs of a forced entry apparent; 3T136-2 to 4—interior of house gave no indication of being disturbed or ransacked; 2T97-22 to 24 and 2T133-1 to 5—bedroom also undisturbed and no evidence of a struggle between victim and her murderer; 3T93-12 to 14 and 3T133-6 to 8—money, jewelry and expensive wristwatches in open view atop bedroom dresser left untouched, and 3T69-21 to 22—nothing ever reported missing from the house.

These witnesses, as well as petitioner's statement to the investigators, established that the victim had been alone with petitioner after 8:30 p.m. on December 15, 1976. And

no one else had ever seen her alive after that. Furthermore, while Dr. Shuster placed the outer limits of Mrs. McDonald's death at 11:00 p.m. that evening and 9:00 a.m. the following morning (4T65-2 to 4T66-24), the jury was also informed that the 7:00 a.m. call of the victim's travel alarm had gone unheeded. (See 3T98-5 to 3T99-15; 3T121-5 to 21).

Although petitioner's formal statement to the investigators contained the claim that his relationship with the victim had recently begun to improve, this same statement included reference to the "heated arguments" the couple had engaged in shortly before. It further proved that their marital situation only three weeks to one month before Mrs. McDonald's murder had reached a point where petitioner was consulting an attorney about divorce. (See 3T31-17 to 3T32-14). The statement disclosed petitioner's ongoing affair with Lisa Boffman (3T33-15 to 3T33-14). Additionally, petitioner's statement suggested no other likely candidate for Mrs. McDonald's murder since "everybody liked [his] wife. She was a good person." (3T34-15 to 20).

Finally, Larry Shafer and Detective Zimmerman chronicled petitioner's attempt to dispose of the clock/radio and that (5T3-20 to 5T13-9) petitioner had subsequently lied about the matter to Detective Zimmerman, claiming that Shafer had thrown the clock/radio out (3T38-24 to 3T43-17; 5T3-20 to 5T13-9).

The parties stipulated that the murder weapon was a .32 caliber handgun of unknown origin (5T38-11 to 5T39-4), and the State rested. Petitioner then moved for a judgment of acquittal and for dismissal of the indictment, the latter motion premised on an alleged divergence in the estimated time of death given by Dr. Shuster before the grand jury and at trial. The applications were denied. (See 5T35-14 to 5T37-3).

The defense proofs subsequently included the testimony of various co-workers who placed petitioner at the company foundry on December 16 from approximately 4:45 a.m. onward (5T39-20 to 5T48-9); character witnesses (5T48-8 to 5T49-9 and 6T6-18 to 6T14-15); a neighbor who recalled hearing an automobile accelerating away from the vicinity of the McDonald house at approximately 6:30 a.m. on December 16 (6T2-11 to 6T4-15); medical experts who faulted the methods utilized by Dr. Shuster in determining the approximate time of the victim's death (4T87-8 to 4T93-9; 6T23-14 to 6T30-12) but did not seriously differ with his estimation (4T93-10 to 4T95-1; 6T30-13 to 6T31-4); and a former prosecutor's detective who noted what he perceived as shortcomings in the official investigtion of the crime (6T59-13 to 6T64-22). The case for the defense concluded with the reading of a deposition by the unavailable Jeanne McDonald Katz which outlined various of her mother's habits (6T81-25 to 6T89-25). Thereafter, the court denied a renewed motion for entry of a judgment of acquittal. (See 7T22-21 to 7T24-10).

In its closing argument to the jury, the defense contended, among other things, that the prosecution had demonstrated no motive for petitioner to have committed the crime and suggested that it was the work of a burglar (8T16-11 to 8T18-16). After recounting the proofs which dispelled this hypothesis, the prosecutor subsequently described Mrs. McDonald's slaying as "a murder of hatred" (8T38-12).

E. Petitioner's post-trial motions to overturn the jury's verdict.

Petitioner moved for judgment NOV and to dismiss the indictment on the ground of false and misleading testimony regarding the estimated time of the victim's death

allegedly rendered by Dr. Shuster before the grand jury. A hearing to explore this latter allegation was subsequently conducted by the trial court on June 28, 1979.

At that time, the State's trial attorney testified that he considered Dr. Shuster's trial testimony concerning the estimated time of the victim's death to have been consistent with that imparted before the grand jury (2TM10-8 to 21; 2TM15-20 to 2TM16-12). Nor had he been aware of any change in the doctor's opinion on this subject prior to trial (2TM10-22 to 2TM11-5).

Dr. Shuster then testified that his opinion concerning the outer limits of the time of death estimate was no different today than it had been initially (2TM19-8 to 20). The doctor recalled his testimony before the grand jury and perceivd no conflict between it and the eight to eighteen hour time span he had later related at trial (2TM19-21 to 2TM20-5).

When subequently pressed on this point by the defense, Dr. Shuster specifically referred to that portion of the grand jury transcript (TGJ23-22 to TGJ24-2) which confirmed that he had stated that Mrs. McDonald had been dead for a minimum of eight hours prior to the preliminary examination of her body conducted shortly before 5:00 p.m. on December 16, 1976 (2TM25-13 to 2TM26-17). Subtracting eight hours from 5:00 p.m. put one outside limit of the estimated time of death provided the grand jurors at the same 9:00 a.m. figure given at trial (2TM26-18 to 25). The doctor adhered to his grand jury opinion that the more probable time of death had been three hours either way of 2:00 a.m. He recalled that he had not been asked for this more precise estimation during the trial (2TM27-1 to 24).

By letter opinion dated July 2, 1979, the trial court denied the defense motions. (App. 6 to App. 10). One week later, the court sentenced petitioner to a term of 12 to 15 years in New Jersey State Prison (TS5-21 to TS7-18; Da2 to Da3).

REASONS SUPPORTING DENIAL OF CERTIORARI

POINT I

Since the evidence against petitioner was overwhelming, since petitioner concedes that the evidence adduced against him was "largely undisputed," and since he also concedes that the New Jersey trial court and appellate court reviews were undertaken pursuant to the proper constitutional standard, denial of certiorari is proper.

Petitioner's contention is that his conviction is based on inadequate evidence. He concedes nevertheless that such evidence as respondent introduced was "largely undisputed." (Petition, p. 19). He also concedes that the New Jersey standard for judging and reviewing a motion for judgment of acquittal at the end of the prosecution's case and at the end of the entire case is functionally equivalent to the standard this Court has mandated in *Jackson* v. *Virginia,* 443 U.S. 307, 319-20, 324 (1979). See *State* v. *Brown,* 80 N.J. 587, 591, 404 A. 2d 1111, 1113-1114 (1979); *State* v. *Reyes,* 50 N.J. 454, 458-59, 236 A. 2d 385, 387-88 (1967) (Petition, pp. 18 to 19).

Petitioner's complaint is nothing more than one of improper fact-finding. Although he suggests that *Jackson* v. *Virginia, supra,* is "relatively recent and the State courts are uniformly concerned with what type of evidence-weighing process that decision will require . . .," (Petition, p. 25), it is evident that the New Jersey courts have had years of experience weighing evidence in criminal cases under a standard petitioner concedes to be essentially identical (Petition, pp. 18 to 19) and therefore not at issue.

He further suggests that "guidelines" are necessary to aid State appellate courts and the Federal District Courts in judging *Jackson* allegations. However, he makes no attempt to formulate such guidelines. Given the factual posture of this case, it is respondent's position that "guidelines" would be inappropriate. The proofs of petitioner's guilt are ample. Moreover, this Court has repeatedly recognized that application of the standard of proof beyond a reasonable doubt is engrained in common law jurisprudence. *E.g., Jackson, supra; In re Winship,* 397 U.S. 358, 361-64 (1970). At this point in judicial history "guidelines" would do little but confuse that which is well-established. Any other path would lead to establishment of rules of circumstantial evidence as matters of federal constitutional law.

As to District Court judgments on habeas corpus petitions, obviously, Petitioner has no standing to raise the issue since this is not such an application. Any guidance will be purely advisory. See, *e.g., Flast* v. *Cohen,* 392 U.S. 83, 95-98 (1968); *Ashwander* v. *T.V.A.,* 297 U.S. 288, 346-48 (1936) (Brandeis J., concurring).

Furthermore, the record is sufficiently compelling to conclude that Petitioner murdered his wife; and that that review under a *Jackson* standard, which the courts of New Jersey concededly performed, can lead to no other conclusion. That Doris McDonald was murdered was beyond dispute; the only issue to be resolved was the identity of her killer.

Petitioner's formal statement to the investigators alerted the jury to the fact that petitioner and his wife had engaged in some "heated arguments" in the recent past. Although the statement contained the claim that their relationship had begun to improve, it was nonetheless true that petitioner had consulted an attorney about di-

vorce only three weeks to one month prior to his wife's murder. At the time of the killing, moreover, petitioner was pursuing an extramarital affair with another woman. These circumstances, it must be noted, form a not unfamiliar backdrop to murder.

Expert medical testimony placed the time of Doris McDonald's death between 11:00 p..m. on December 15 and 9:00 a.m. on December 16. The autopsy results and the fact that the victim's travel alarm was allowed to run out, however, strongly suggested that she was dead prior to 7:00 a.m. It was, of course, uncontested that petitioner and the victim were home alone together from 8:30 p.m. on December 15 until after 4:00 a.m. the following morning. Thus, it is clear that petitioner had ample opportunity to kill his wife.

The evidence negated the likelihood that Doris McDonald was killed by a burglar or other intruder after petitioner had left that morning. In his statement, petitioner acknowledged observation of nothing unusual in the neighborhood as he was departing and he himself had locked and checked the front door. The back door to the house was also locked and examination of the house immediately after the body was discovered revealed no trace of a forced entry or break-in. The undisturbed appearance of the interior of the McDonald residence, including the bedroom, also belied outside intrusion, and the absence of any signs of a struggle intimated that the killer was not a stranger but one freely admitted to the marital bedchamber. The fact that money, jewelry and expensive wristwatches in open view atop the bedroom dresser were left untouched further confounds any "burglar as the murderer" theory. The absence of any evidence of sexual assault rules out a rapist-murderer. Thus, the evidence plainly permitted the conclusion that only

one person had a plausible opportunity to murder the victim, petitioner.

Some proofs directly implied petitioner's guilt. Others tended to exclude the possible guilt of anyone else, thereby enhancing the quality of the positive proofs. For example, the evidence clearly indicated a continuing tension in petitioner's relationship with his wife. As noted earlier, his satement to the authorities acknowledged "heated arguments" with the victim in the recent past, contemplation of divorce and consultation of an attorney to that end only three weeks to one month prior to his wife's murder and an ongoing extramarital affair with another woman. These factors, when combined together, suggest that petitioner had reason to desire his wife's death.

Furthermore, aspects of the defense case, particularly Jeanne McDonlad Katz's deposition regarding her mother's habits reinforced the showing that petitioner had been the victim's killer. As the prosecutor noted in his summation, the Katz deposition demonstrated the unlikelihood of any claim that Doris McDonald had survived the night of December 15-16 only to be killed by an intruder after petitioner's departure that morning.

Upon considering the facts and circumstances adduced in this case as well as inferences reasonably derived from them, the jury below was convinced beyond a reasonable doubt that petitioner had killed his wife. The question now becomes whether "reviewing that evidence in the light most favorable to the prosecution," any rational trier of fact could have reached the same conclusion. *Jackson, supra.* As exhaustively delineated above, the circumstances demonstrated beyond a reasonable doubt that only petitioner had both opportunity and motive. It is clear that petitioner was shown to have ample reason to wish his

wife dead. The factors include his relationship with Ms. Boffman, the belief his cancer was terminal, and the general deterioration of his marriage. The prosecutor commented in summation that this was a murder of hatred, and the multiple gunshot wounds to the victim's head, fired at close range, offer substantial support for that characterization.

In view of the foregoing, it is thus clear that all this Court would do, in light of its recent decision in *Jackson, supra,* is to again review the evidence, a task already undertaken in plenary manner by trial and appellate judges. Therefore, there are no evident reasons for this Court to review the matter on *certiorari.* The relevant law is undisputed, as are the facts. *U.S. Sup. Ct. R.* 17.1. All that remains is an evaluation of circumstantial evidence, a process for which a properly instructed trial jury is best suited, as was the case here.

POINT II

Petitioner's non-custodial statement to a police detective was properly admitted into evidence.

A. Introduction

Petitioner's second attempt to obtain review of his well-founded conviction is, in effect, a request for this Court to again engage in fact-finding. Respondent submits that this is an insubstantial ground for the grant of *certiorari.* No adversary criminal proceedings had been commenced at the time of the allegedly improper interview. Nor was the questioning a custodial interview. Petitioner had been advised of his rights three times during the course of the investigation. After taking the affirmative step of retaining counsel, and thereafter, of reviewing the matter with

counsel during the investigation, petitioner nevertheless discussed the facts during the investigation with police on several occasions in non-custodial settings.

Evidently, petitioner decided to cooperate with the police in an apparent and ongoing attempt to further his own interest. One of these non-custodial interviews, on March 10, 1977, was addressed to petitioner's incriminatory post-murder behavior. Petitioner's statements led the detective, and could have led the trial jury, to believe that petitioner's post-murder conduct was indicative of a consciousness of guilt. Without assessing the beneficial effect he might have reaped from his cooperation with the police from preceding interviews, he now challenges the March 10, 1977 interview itself as somehow interfering with his right to counsel.

After the discovery of Doris McDonald's body, the investigating officers interrogated all those present at the crime scene. Prior to the questioning of petitioner herein, Detective Zimmerman administered the *Miranda* warnings. Petitioner thereupon waived the protection of his constitutional rights, signed a *Miranda* warning card and responded to the detective's inquiries. Later that evening, petitioner rendered a formal statement at the County Prosecutor's Office. This too was preceded by recital of the *Miranda* rights by the investigators and waiver thereof by petitioner at that time before administration of a polygraph. Finally, petitioner was reapprised of and waived his rights. During the ensuing months of the investigation, Detective Zimmerman called upon petitioner at either his home or place of business on several occasions. At these times, Detective Zimmerman did not reiterate the full *Miranda* warnings; he merely advised petitioner that he was not obligated to speak with the authorities. Petitioner, however, invariably responded to Detective Zimmerman's inquiries.

On March 10, 1977, Detective Zimmerman visited petitioner at his business to inquire about the condition of the bedroom wall and the clock/radio which had been in that room. As before, the detective did not preface his questions with recitations of the full *Miranda* warnings. He merely readvised petitioner of his right to refuse the interview. And as before, petitioner chose not to invoke that right. Thereafter, in response to queries about the whereabouts of the clock/radio, petitioner voiced the telling falsehood that his son-in-law, Larry Shafer, had thrown it out. This was introduced at trial over petitioner's objection.

B. There is no right to counsel before the institution of adversarial proceedings or at a non-custodial interview.

Respondent would note that the strictures of the *Miranda* decision apply only to custodial interrogations; the rule of that case and its progeny are implicated only when the individual has been taken into official custody or otherwise deprived of his freedom of action in a significant way. *Edwards* v. *California,* —— U.S. ——, ——, 49 *U.S.L.W.* 4496, 4497-498 (May 18, 1981); *Rhode Island* v. *Innis,* 446 U.S. 291, 298 (1980); *Oregon* v. *Mathiason,* 429 U.S. 492, 494-495 (1977); *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966). In the instant matter, petitioner was neither in custody nor in any way deprived of his freedom of action. The interview was conducted at petitioner's place of business and at its conclusion petitioner presumably went back to job duties. Hence, the administration of *Miranda* warnings was not required, so the failure to give full warnings cannot base a claim of error.

Nor can petitioner claim that the March 10 interview had abridged his Sixth and Fourteenth Amendment rights to counsel. As has long been established, the right to counsel in a constitutional sense does not attach until the insti-

tution of some form of adversary judicial proceeding, whether it be formal charge, preliminary hearing, indictment, information or arraignment. *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972); *Powell* v. *Alabama*, 287 U.S. 45, 66-71 (1932). It does not accrue, however, during investigatory stages which precede a formal charge. *Kirby* v. *Illinois, supra* at 406 U.S. at 689. In the matter herein, the interview in question preceded the institution of any formal adversarial proceeding against petitioner by more than three months. Accordingly, it is clear that petitioner had no Sixth Amendment constitutional right to the presence of counsel during his meeting with Detective Zimmerman.

Nor was there any interference with the attorney client relationship, and thus there is no error in a constitutional sense. See *United States* v. *Morrison*, —— U.S. ——, 101 S.Ct. ——, 66 L.Ed.2d 564 (1981); *United States* v. *Henry*, —— U.S. ——, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In each of the preceding cases, the prosecution's conduct was designed to insert a barrier between the accused and counsel. Indeed, in those cases, the accused was warned not to exercise his rights. Of course, here, petitioner was not an "accused." And, the interviewer was solicitous in reminding him of the absence of any legal requirement that he speak. Factually, as the trial and appellate courts found, there was no interference with the right to counsel.

Finally, there is no need to suspend common sense in this matter. Petitioner was a businessman, of more than usual alertness, well aware of his rights, who had retained a lawyer to assist him. It strains the bounds of reason to intimate he did not know exactly what he was doing when he spoke with Detective Zimmerman. He went to counsel when one of his daughters had been interviewed, taking the woman to see the attorney. There is no reason to believe that petitioner's access was hindered or the relation-

ship hampered in any way by Detective Zimmerman. His own tactic backfired, and he now tries only to raise his own misstep to a constitutional level.

C. Petitioner's claim of due process violation was not advanced at the appellate level but if it was preserved, no violation is evident.

Petitioner appears to argue that Detective Zimmerman was under a duty to notify defense counsel of the March 10 interview and his failure to do so constituted a violation of due process. In support of this contention, petitioner relies upon *United States* v. *Thomas,* 474 F.2d 110 (10 Cir. 1973), *cert.* den. 412 U.S. 932 (1973), and its progeny as well as DR7-104(A)(1). Petitioner claims that the courts below viewed the interview "as constituting, at most, an ethical infraction rather than a deprival or infraction of his right to counsel." (Petition, p. 36).

There are two threshhold inadequacies in this analysis. First, his only allegation of a "due process" violation in the New Jersey Appellate Division, was that the 14th Amendment's due process clause is the means for application of the 6th Amendment to the States, as indicated in Point IIB, *supra.* Although he made an argument of ethical breach to the courts, he never claimed an independent 14th Amendment violation derived therefrom. The State appellate court dealt with the matter as an ethical breach and not a due process violation. (App., p. 29). So, the issue arises for the first time now before this Court. This raises the second inadequacy in dealing with the claim. The New Jersey court noted that "even assuming" an ethical breach had occurred, no relief would have been warranted. This is not the same as holding "at most" an ethical breach occurred. The latter implies the occurrence, the former does not; the court thus did not imply that an ethical breach occurred.

Much of what has been set forth in Point IIB, *supra*, applies here. Granting for purposes of this argument the long-standing sanctity of the attorney-client relationship in the common law, and accepting similarly for argument's sake that any governmental interference therewith may run afoul of fundamental notions, it is clear that this case does not present a vehicle for establishing any such conceptual structure. The facts discussed above show no tampering and no interference. Petitioner herein was routinely questioned at his place of business and presumably returned to his job duties the moment the interview concluded. In such situations, courts have held there is no obligation to notify counsel. See *People* v. *Merkel*, 23 Ill. App. 3d 298, 302, 319 N.E.2d 77, 81 (App. Ct. 1974). See also, *United States* v. *Masullo*, 489 F.2d 217, 221-223 (2 Cir. 1973). Moreover, as noted, if any right existed, petitioner waived it.

D. Petitioner waived counsel's presence at the interview.

Petitioner's contention is that waiver of the right to counsel could not be inferred from his conduct on March 10 and that the waiver of this right must always be explicit does not merit extended consideration. Suffice it to say that this Court recently has determined that waiver of the right to counsel need take no designated legal form. See *North Carolina* v. *Butler*, 441 U.S. 369, 374-75 (1979).

In the instant matter, the trial and appellate courts concluded that petitioner had been fully aware of his rights at the time of the March 10 interview, including his right to have counsel present. He cooperated on prior occasions. Petitioner chose to respond to Detective Zimmerman's questions. That such conduct manifests a clear waiver of the right to counsel cannot be disputed. Accordingly, for that reason, as well as the other arguments presented here-

in, respondents respectfully submits that petitioner's March 10 statement was properly admitted into the trial record and presents no constitutional issues.

POINT III

Petitioner's motion to dismiss the indictment for prosecutorial misconduct was properly denied and presents no issues for certiorari.

Petitioner alleges a third factual failing in the proceedings. Here he contends the grand jury returned its indictment on the basis of false testimony. Since the medical examiner gave testimony more favorable to petitioner at trial than he did before the grand jury, respondent cannot perceive the existence of any viable issue. Simple application of *a fortiori* reasoning dispels any intimation of error. Applicant was adjudged guilty beyond any reasonable doubt by a unanimous petit jury with the benefit of the allegedly less favorable evidence than the grand jury which indicted by a mere majority vote on a standard of proof akin to probable cause. Moreover, petitioner had discovery of the grand jury evidence and could have cross-examined thereon, had he so chosen.

In any event, it is respondent's position that petitioner's allegations are unsubstantiated by the record. Again, as with the previous points, the relevant standards are well established; the prosecution's knowing use of perjurious testimony in the grand jury level is sanctionable. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338 (1974). But petitioner seeks only to apply a potentiality to facts which respondent submits do not support the position. No constitutional issues are at stake.

At the grand jury level, respondent's medical expert was asked to pinpoint the time of death, which he did. This testimony was part of a longer exposition concerning the time frame in which the victim could have died. The pinpoint logically led to the conclusion that petitioner was the murderer. Knowing that the petitioner had arrayed against the respondent a battery of "super-star" medical experts to contest the respondent's findings, the prosecution contented itself with the more general testimony. Of course, since applicant had discovery of the grand jury testimony, he could have cross-examined the expert thereupon had he chosen. He chose not to do so and has instead contended that the grand jury testimony was somehow false. In point of fact, it obviously was not false and his characterization thereof as false is baseless.

The county medical examiner testified at grand jury that he had commenced a preliminary examination of Doris McDonald's body at 4:50 p.m. on December 16, 1976. A full autopsy was performed the following morning (TGJ 21-8 to 24). After noting the placement of the victim's various wounds and rendering his opinion on the cause of death, Dr. Shuster gave 2:00 a.m. on December 16 as his estimation of the time of the victim's death (TGJ23-6 to 14). Based upon the lividity, *i.e.*, the settling of the blood in one area of the body after death, the doctor opined that the victim "had been dead a minimum of eight hours" prior to the preliminary examination conducted during the afternoon of December 16 (TGJ23-15 to TGJ24-2). *Rigor mortis* of limbs suggested that the victim had died 12 to 18 hours before the preliminary examination (TGJ24-2 to 7). When queried further concerning the probable time of death, Dr. Shuster replied that a "good estimation" would vary from five to six hours prior to 2:00 a.m. to three hours past 2:00 a.m. (TGJ24-23 to TGJ24-4).

As he had before the grand jury, the doctor testified at trial that the lividity of the victim's body indicated that she had been dead a "minimum of eight hours" prior to the preliminary examination (4T42-8 to 4T43-24). The degree of *rigor mortis* noted at that time indicated that the victim had been dead 12 to 18 hours prior thereto (4T40-8 to 4T42-7). Thus, based upon these observations, Dr. Shuster opined that Doris McDonald had ". . . died certainly more than eight hours prior to the time I saw her [namely, 4:50 p.m. on December 16] and somewhat less than eighteen hours." (4T44-25 to 4T45-7). The doctor was not asked for nor did he render a more restricted or precise estimation of the time of death at any point thereafter during the trial, neither on direct nor on cross-examination.

To attack the trial testimony, petitioner marshalls case law primarily invalidating indictments founded upon demonstrably prejurious grand jury testimony or deliberate governmental abuse of grand jury processes. None of the abuses decried by petitioner actually took place. Simply put, petitioner is complaining about things which did not happen.

The allegation that the prosecution was on notice of a change in Dr. Shuster's estimation of the victim's time of death was clearly disproved during the proceedings below. The State's trial prosecutor repeatedly indicated that from his review of the grand jury transcript, interviews with Dr. Shuster and discussions with others involved in the case, the 8 to 18 hour time of death estimate given by the doctor at trial was consistent with the doctor's grand jury testimony. (See 2TM4-10 to 2TM5-20; 2TM10-8 to 21; 2TM14-16 to 2TM16-12). He maintained this to be accurate, even though Dr. Shuster had also provided a narrow estimation of five to six hours

before to three hours after 2:00 a.m. to the grand jury in addition to his eight to eighteen hour estimate before that body (2TM12-9 to 2TM13-15). The prosecutor further believed that Dr. Shuster would have reiterated his narrower estimation at trial had he been asked for it. The doctor simply had not been asked (2TM13-16 to 2TM14-22). In sum, the prosecutor was aware of no change in the doctor's opinion on the subject.

As was subsequently established, the prosecutor was unaware of changes in Dr. Shuster's opinion because there were none; at the motion hearing, the doctor testified that his opinion concerning the outer limits of the time of death estimate were no different at present than it had been initially (2TM19-8 to 20). Dr. Shuster recalled his testimony before the grand jury and perceived no conflict between it and the eight to eighteen hour time span he had later related at trial (2TM19-21 to 2TM20-5).

When subsequently pressed on this point by the defense, Dr. Shuster specifically referred to the portion of the grand jury transcript (TGJ23-22 to TGJ24-2) which confirmed that he had stated Mrs. McDonald had been dead for a minimum of eight hours prior to the preliminary examination of her body conducted shortly before 5:00 p.m. on December 16, 1976 (2TM25-13 to 2TM26-17). Subtracting eight hours from 5:00 p.m. put one outside limit of the estimated time of death provided the grand jurors at the same 9:00 a.m. figure given at trial (2TM26-18 to 25). The doctor nevertheless adhered to his grand jury opinion that the more probable time of death had been three hours either way of 2:00 a.m. He recalled, however, that he had not been asked for this more precise estimation during the trial (2TM27-1 to 24).

Finally, the trial jury had the benefit of the "exculpatory" eight to 18 hour estimation that petitioner now in-

sists should have been emphasized before the grand jury. Nothwithstanding that, the trial jury found petitioner guilty of the crime charged beyond a reasonable doubt. To conclude that the grand jury, whose mandate need satisfy a far less demanding standard, would not have returned an indictment on the basis of evidence which the trial jury found sufficient to convict requires more than acquiescence in anomaly. No constitutional issues are presented.

CONCLUSION

For the foregoing reasons, respondent, the State of New Jersey, respectfully requests that this Court decline to issue a writ of certiorari.

Respectfully submitted,

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